In the Supreme Court of the United States

No. 464

CHICAGO GREAT WESTERN RAILWAY COMPANY,
Petitioner,

vs.

LESLIE J. KENNEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

JURISDICTION

The respondent admits that this Court has jurisdiction to grant a Writ of Certiorari in this case, but he contends that this case is not a proper one for the exercise of such jurisdiction and that because that is true, the Court should deny certiorari.

STATEMENT OF THE CASE

Respondent confesses that he is not sure as to the scope of the statement of the facts which he should make. Certainly, he cannot accept the statement made by petitioner for the reason that there are statements made by the petitioner which are entirely unsupported by the evidence. Rule 23 (1) (e) of the Revised Rules of the Supreme Court of the United States provides:

"The petition for writ of certiorari shall contain in the order here indicated—

(e) A concise statement of the case containing the facts material to the consideration of the questions presented."

We have presumed this to mean that the petitioner should state accurately and precisely those facts which raise the question which he presents to the Court by his petition for review. In the light of this, we think that an adequate statement of the facts would be those set forth in the opinion of the Court below (R. 393-401).

Plaintiff's testimony regarding the sequence of his positions upon alighting from the train is there summarized as follows: (R. 396)

"I put my one foot down close to the ground—as close as I could, and then I let go and lit on the back of my heels and leaned back to keep my balance; and when I lit on my heels, I got a severe shock at that speed that went up through my legs and body, and it was a sharp pain; * * *."

On cross-examination plaintiff testified:

"Q. When you struck the ground after both of your feet had touched the ground, you straightened up and leaned back so that you wouldn't be pitched by the force of the movement of the train headfirst.

A. I didn't straighten up.

Q. Didn't you lean back?

A. I leaned back, and then by straightening up you keep your balance."

In the foregoing testimony plaintiff's position while in the air and immediately upon the touching of his heels to the ground is not disclosed. The testimony establishes, if anything, that plaintiff did not lean back until after his feet touched the ground and he had already received the shock which allegedly injured his spine.

In regard to defendant's objection to the hypothetical question asked of plaintiff's doctor, the record discloses that no objection was made to the omission of the position of the plaintiff's body at the time his feet struck the ground, but rather to other alleged omissions, namely, that the hypothetical question failed to cover *his activities immediately after the accident,* nor does it show the *extent and effect of the injury which he received to the hip in 1934*. The record (R. 175) is as follows:

> "Mr. Grannis: Same objection.
>
> The Court: Well, is counsel able to state what portion of the hypothetical question is not supported by evidence?
>
> Mr. Grannis: Yes. I don't believe that the hypothetical question covers his activities as shown by the evidence immediately after the accident, nor does it show the actual extent and character and effect of the injury which he received to his hip which was fractured in 1934.
>
> The Court: Well, I'm inclined to believe that the doctor's examination and the X-rays and the findings in that respect together with what is stated in the hypothetical question is sufficient on that ground. I don't recall whether you stated in your hypothetical question the speed of the train.
>
> Mr. Austin: Yes, I believe I did. I thought I did, your Honor. I thought I mentioned that the speed of the train at the time the man dismounted was about twenty-five to twenty-seven miles an hour.
>
> The Court: Well, the objection will be overruled, and you may be permitted to answer.
>
> Mr. Grannis: Exception.
>
> A. That that accident is the cause of his difficulty as described now.
>
> Mr. Austin: Thank you, Doctor. That's all."

In summary, the record shows that

(1) the position of plaintiff's spine when he first struck the ground is not in the testimony and (2) the defendant

made no objection during trial to the doctor's opinion in answer to a hypothetical question which omitted the position of plaintiff's body as his feet struck the ground.

I.

There is no special or important reason for the granting of a writ in the instant case.

Rule 19 of the Revised Rules of the Supreme Court of the United States provides in part:

> "Rule 19. Considerations Covering Review on Certiorari"
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

It is respectfully submitted that this petition neither raises a novel question nor does it show any conflict with applicable decisions of this Court.

As in the appellate procedure in the lower Courts, this petition is predicated upon a fact question and not a legal proposition. The plaintiff introduced competent evidence that the traumatic force occurring when plaintiff's heels touched the ground was not merely a possible causal factor of the condition but that it was the causal factor which produced a compression fracture of the lumbar vertebrae in plaintiff's back. (R. 176, ff. 1, 2). As pointed out by the Supreme Court of Minnesota, inferences arose from the testimony of the plaintiff that he received a severe shock accompanied by

sharp pain which traveled up his legs and into his back when alighting from the moving train and the fact that the plaintiff had been incapacitated from working as a railroad brakeman since the accident.

The medical testimony was in conflict but it should be noted that an assumption was added to the hypothetical question given to the defendant's doctors—namely, that while plaintiff *was in the air* after releasing his hold on the engine, and as his heels *struck the ground,* he was *maintaining* a position of leaning back. At no place is there evidence to this effect. Even assuming the conflict in the medical testimony, the question remains one of fact.

It is well established that fact questions in trials of Federal Employers' Liability Act cases are to be resolved by the jury and not the Court.

Bimberg v. N. P. Ry. Co., 217 Minn. 187, 14 N. W. 2d 410.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610.

Bailey v. Central Vermont R. Co., 319 U. S. 350, 87 L. Ed. 1444.

Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. Ed. 520.

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916.

Ellis v. Union Pacific R. Co., 327 U. S. 640, 91 L. Ed. 473.

Wilkerson v. McCarthy, 93 L. Ed. 403, 69 S. Ct. 413.

The opinions of the Supreme Court have declared that it is "The clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury, *Tiller v. Atlantic Coast Line R. Co.,* supra; that such cases may not be taken from the jury merely

because the question of liability is "close or doubtful," *Bailey v. Central Vermont Ry.* supra; that the jury has the right to make "all reasonably possible inferences" from such probative facts in the evidence as it chooses to accept, and "It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences," *Tennant v. Peoria & P. U. Ry. Co.*, supra; that in any choice between possible inferences "a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference but only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear," *Lavender v. Kurn*, supra; courts may not act on the theory that "juries will fall short of a fair performance of their constitutional function" but they must assume that a jury "finds facts only because they are proved," *Wilkerson v. McCarthy*, supra.

In *Ellis v. Union Pacific R. Co.*, supra, the Court said:

> "Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fairminded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

The above is the law that the lower Court applied in the instant case and as submitted presents no novel nor conflicting law as compared with the decisions of this Court. For this reason alone the petition should be denied.

II.

There is no merit to the legal propositions advanced by appellant.

In addition to the objection that the instant case is not a proper one for Petition for Writ, the plaintiff submits that there is no merit to the legal propositions advanced by the appellant. We will not reiterate the argument advanced above showing that the causal relation was a fact question for the jury, but will confine this to the objection to the hypothetical question.

The defendant objected to the hypothetical question first put to Dr. Titrud on the ground that it failed to include certain facts as to his activities immediately after the accident and the character and effect of the hip injury of 1934. There was no specific objection to what it has raised on appeal—namely, that it failed to include the posture of the plaintiff as his heels struck the ground. The Minnesota Supreme Court held that this ground was not raised by its objections at the trial. This not only is the law in Minnesota but also the federal law.

Hawkins v. Missouri Pac. R. Co., C. A. Ark. 1951, 188 Fed. 2d 348.

United States v. Stone, 106 U. S. 525, 1 S. Ct. 287.

Woodbury Patent Planing Machine Company v. Keith, 101 U. S. 479, 25 L. Ed. 939.

The reason for the rule is stated in *American Jurisprudence, Appeal and Error*, Section 246, as follows:

> "The general rule, subject to certain limitations and exceptions hereinafter noted, is that an appellate court will consider only such questions as were raised and reserved in the lower court. This rule is based upon considerations of practical necessity in the orderly ad-

ministration of the law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel. Obviously, the ends of justice are served by the avoidance of the delay and expense incident to appeals, reversals, and new trials upon grounds of objection which might have been obviated or corrected in the trial court if the question had been raised. There would be no assurance of any end to the litigation if new objections could be raised on appeals. Where a party has the option to object or not, as he sees fit, the failure to exercise the option when the opportunity therefor presents itself must, in fairness to the Court and to the adverse party, be held either to constitute a waiver of the right to object, or to raise an estoppel against the subsequent exercise thereof."

CONCLUSION

The Petition for Certiorari raises no substantial question for the consideration of this Court. We therefore respectfully submit that the Court should deny the Petition for Certiorari, and further submit that Rule 56, Section 4 of the United States Supreme Court rules should be applied in the instant case.

Respectfully submitted,

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